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William F. Caton, Acting Secretary
Federal Communications Commission
Washington, DC 20554

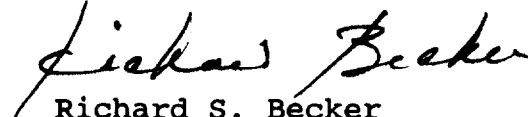
Re: PR File No. 94-SP7

Dear Mr. Caton:

Transmitted herewith on behalf of Ray's Electronics, Inc. pursuant to the Commission's August 12, 1994, Public Notice entitled, "State Petitions To Retain Authority Over Intrastate Mobile Service Rates," DA 94-876, are one (1) original and four (4) paper copies and one (1) silver master microfiche and two (2) diazo duplicate microfiche copies of "Comments" opposing a petition by the Public Utilities Commission of Ohio to retain authority to regulate Commercial Mobile Radio Service.

Should any questions arise with respect to this matter, please communicate directly with this office.

Respectfully submitted,



Richard S. Becker
Attorney for Ray's
Electronics, Inc.

Enclosures

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In re

STATEMENT OF THE PUBLIC
UTILITIES COMMISSION OF
OHIO'S INTENTION TO PRESERVE
ITS RIGHT FOR FUTURE RATE
AND MARKET ENTRY REGULATION
OF COMMERCIAL MOBILE
RADIO SERVICES

PR File No. 94-SP7

To: The Commission

COMMENTS

Respectfully submitted,

RAY'S ELECTRONICS, INC.

Richard S. Becker
James S. Finerfrock
Becker & Madison, Chartered
1915 Eye Street, N.W.; 8th Floor
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(202) 833-4422

Its Attorneys

Date: September 19, 1994

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SUMMARY

By these Comments, Ray's Electronics, Inc. ("REI") opposes the "Statement Of The Public Utilities Commission of Ohio's Intention To Preserve Its Right For Future Rate And Market Entry Regulation Of Commercial Mobile Services" ("Statement") filed by the Public Utilities Commission of Ohio ("PUCO") seeking Commission authorization to retain the PUCO's authority to regulate rate, entry and other terms and conditions of Commercial Mobile Radio Service ("CMRS") provided in the State of Ohio.

REI is a communications carrier licensed by the Commission to provide CMRS in the State of Ohio. As an existing and experienced communications carrier, REI believes that it is in an excellent position to provide the Commission with insight into the communications marketplace in the State of Ohio. REI respectfully submits that the Commission must reject the PUCO's request to continue regulation of "other terms and conditions" of the provision of CMRS. REI also respectfully submits that the Commission must reject the PUCO's attempt to retain authority to impose rate and market entry regulation of CMRS in the future.

REI must first emphasize that the PUCO's attempt to retain the right to regulate entry into the CMRS marketplace is contrary to the Communications Act of 1934 (the "Act"), as amended by the Omnibus Budget Reconciliation Act of 1993 (the "Budget Act"). Although Congress permitted states to petition the Commission to retain authority to regulate the rates of CMRS service, no provision was made for states to continue to regulate entry by CMRS carriers. Accordingly, the PUCO's attempt to retain authority to regulate CMRS market entry in the future must be rejected.

The PUCO's attempt to retain authority to regulate the rates of CMRS service must also be rejected. The PUCO failed utterly to provide any empirical evidence with respect to the communications marketplace or consumer protection in the State of Ohio as required by Congress and the Commission to support the PUCO's request to retain rate regulation authority. The PUCO failed to meet its burden of proof that continued CMRS rate regulation authority is necessary under either of the two (2) statutory tests enunciated in the Budget Act. Accordingly, the PUCO's Statement must be rejected.

REI also respectfully submits that there is no need for the PUCO to retain authority to exercise rate regulation over CMRS in the State of Ohio. The highly competitive nature of the CMRS marketplace in Ohio makes PUCO rate regulation of CMRS unnecessary. Moreover, PUCO rate regulation of CMRS would be counterproductive because it would: (1) take away carriers' ability to make rapid, efficient responses to changes in demand and cost, and remove incentives for carriers to introduce new offerings; (2) impede and

remove incentives for competitive price discounting, since all price changes are public, which can therefore be quickly matched by competitors; (3) impose costs on carriers that attempt to make new offerings; and (4) impose unnecessary administrative costs and burdens on carriers.

Finally, the two (2) forms of regulation that the PUCO currently imposes on CMRS must also be preempted pursuant to the Act, as amended by the Budget Act, and the Supreme Court's decision in Louisiana PSC. This state regulation of jurisdictionally-mixed CMRS service thwarts and impedes the federal policy of creating regulatory symmetry that has now been clearly enunciated by Congress and the Commission. Moreover, the PUCO's existing regulation of "other terms and conditions" of CMRS is not necessary: (1) given the extremely competitive state of the CMRS industry in the State of Ohio; and (2) because consumers in Ohio will continue to have recourse against CMRS carriers pursuant to those provisions of Title II of the Act that the Commission declined to forebear from enforcing against CMRS carriers.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In re

STATEMENT OF THE PUBLIC
UTILITIES COMMISSION OF
OHIO'S INTENTION TO PRESERVE
ITS RIGHT FOR FUTURE RATE
AND MARKET ENTRY REGULATION
OF COMMERCIAL MOBILE
RADIO SERVICES

PR File No. 94-SP7

To: The Commission

COMMENTS

Ray's Electronics, Inc. ("REI"), by its attorneys and pursuant to the Commission's August 12, 1994, Public Notice entitled, "State Petitions To Retain Authority Over Intrastate Mobile Service Rates,"¹ hereby submits these Comments opposing the "Statement Of The Public Utilities Commission of Ohio's Intention To Preserve Its Right For Future Rate And Market Entry Regulation Of Commercial Mobile Services"² filed by the Public Utilities Commission of Ohio ("PUCO") seeking Commission authorization to retain the PUCO's authority to regulate rate, entry and other terms and conditions of Commercial Mobile Radio Service ("CMRS") provided in the State of Ohio. In opposition, the following is respectfully shown.

¹Public Notice, "State Petitions To Retain Authority Over Intrastate Mobile Service Rates," DA 94-876 (August 12, 1994) (hereinafter "PN").

²This document will be referred to hereinafter as the "Statement."

I. The Interest Of REI

1. In its PN, the Commission announced the filing by eight (8) states of petitions seeking to retain authority to regulate CMRS.³ The Commission invited the filing of comments in response to these petitions.⁴ REI is a communications carrier licensed by the Commission to provide CMRS in the State of Ohio. As an existing and experienced communications carrier, REI believes that it is in an excellent position to provide the Commission with insight into the communications marketplace in the State of Ohio. As set forth herein, REI respectfully submits that the Commission must reject the PUCO's request to continue regulation of "other terms and conditions" of the provision of CMRS. REI also respectfully submits that the Commission must reject the PUCO's attempt to retain authority to impose rate and market entry regulation of CMRS in the future.⁵

³PN, p.1.

⁴Id.

⁵At the outset, it should be noted that the FCC defines CMRS as:

A mobile service that is: (1)(A) provided for profit, i.e., with the intent of receiving compensation or monetary gain; (B) an interconnected service; and (C) available to the public, or to such classes of eligible users as to be effectively available to a substantial portion of the public; or (2) the functional equivalent of such a mobile service described in paragraph (1).

47 C.F.R. §20.3.

CMRS encompasses one-way paging service [including both RCC and PCP one-way paging services] and two-way mobile service [including cellular, conventional two-way mobile telephone and some Specialized Mobile Radio ("SMR") systems]. 47 C.F.R. §20.9(a);

II. Background

2. On August 10, 1993, Section 6002 of the Omnibus Budget Reconciliation Act of 1993 ("Budget Act")⁶ amended Sections 3(n) and 332 of the Communications Act of 1934 (the "Act")⁷ to create a comprehensive framework for the regulation of all mobile radio services, including establishment of rules defining the regulatory status and treatment of mobile services and establishment of two new classes of mobile services -- CMRS and private mobile radio service ("PMRS"). The Budget Act also preempted state and local rate and entry regulation of all CMRS and PMRS effective August 10, 1994.⁸ Pursuant to Section 332(c)(3)(B) of the Act as now amended, however, any state that has rate regulation of CMRS in effect as of June 1, 1993, may petition the FCC to extend that authority based on a showing that: (1) "market conditions with respect to such services fail to protect subscribers adequately from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory;" or (2) "such market conditions exist and such service is a replacement for land line telephone exchange service for a substantial portion of the telephone land line exchange service within such State."⁹ States were required to file such

Second Report and Order, GN Docket No. 93-252, FCC 34-31, ¶¶81-109 (March 7, 1994) (hereinafter "Second R&O").

⁶Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, §6002, 6002, 107 Stat. 312 (1993).

⁷47 U.S.C. §§3(n), 332.

⁸Budget Act, §6002(c)(2)(A).

⁹47 U.S.C. §§332(c)(3)(A) - (B).

petitions prior to August 10, 1994.¹⁰

3. On March 7, 1994, the FCC released its Second R&O to amend the FCC's rules to implement these modifications to the Act, including adoption of rules relating to filing of petitions by states seeking to continue rate regulation of CMRS after August 10, 1994.¹¹ In the Second R&O, the FCC recognized that Section 332(c)(3)(A) of the Act specifically provides that the changes to the Act adopted by the Budget Act do not "prohibit a State from regulating the other terms and conditions of [CMRS]."¹² The FCC went on to note, however, that, "if we determine that a State's regulation of other terms and conditions of jurisdictionally mixed services thwarts or impedes our federal policy of creating regulatory symmetry, we would have authority under Louisiana PSC to preempt such regulation."¹³

4. Faced with this Congressional and FCC action, on August

¹⁰47 U.S.C. §332(c)(3)(B).

¹¹Second R&O at ¶¶240-257; see 47 C.F.R. §20.13.

¹²Second R&O at ¶257; 47 U.S.C. §332(c)(3)(A).

¹³Second R&O at n.517. In Louisiana Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 375 n.4 (1986) ("Louisiana PSC"), the Supreme Court held that the FCC may preempt state regulation of intrastate service when it is not possible to separate the interstate and intrastate components of the subject regulation. In interpreting this inseparability doctrine, federal courts have held that where interstate services are jurisdictionally "mixed" with intrastate service and facilities otherwise regulated by the states, state regulation of the intrastate service that affects interstate service may be preempted where the state regulation thwarts or impedes a valid federal policy. See National Ass'n of Reg. Util. Comm'ners v. FCC, 525 F.2d 630 (D.C.Cir. 1976); Illinois Bell Tel. v. FCC, 883 F.2d 104 (D.C.Cir. 1989); California v. FCC, 905 F.2d 1217 (9th Cir. 1990).

8, 1994, the PUCO submitted its Statement requesting continued authority to regulate CMRS. Specifically, the PUCO stated that it currently has authority to regulate all aspects of CMRS, including entry, rate and other terms and conditions.¹⁴ The PUCO went on to note, however, that at present, the PUCO does not exercise its authority to regulate entry or rates of CMRS.¹⁵ The PUCO does currently regulate CMRS in two specific areas: (1) "the [PUCO] does use its complaint authority ... to ensure that rates of a cellular wholesaler are not unduly discriminatory, preferential to its affiliates, or set below cost for the purpose of inhibiting competition;"¹⁶ and (2) "the [PUCO] is engaged in the review of contractual arrangements between two or more regulated utilities, including interconnection agreements and roaming agreements entered into by CMRS providers."¹⁷ The PUCO alleged that these two aspects of current regulation of CMRS are "other terms and conditions" of CMRS regulation that were not preempted by the Budget Act.¹⁸ The PUCO also went on to allege that its Statement was submitted, "to preserv[e] Ohio's right to pursue more traditional rate and market entry regulation in the future."¹⁹ REI hereby opposes each and every aspect of the PUCO's request to continue to regulate CMRS as

¹⁴Statement, p.1-2.

¹⁵Id.

¹⁶Id. at 2.

¹⁷Id.

¹⁸Id. at 4.

¹⁹Id.

currently regulated or to retain authority to regulate CMRS entry and rate regulation in the future.

**III. The PUCO's Attempt To Retain Authority To Regulate
Market Entry Of CMRS Carriers Is Contrary To The Act**

5. REI must first emphasize that the PUCO's attempt to "preserv[e] Ohio's right to pursue more traditional ... market entry regulation in the future"²⁰ is directly contrary to Sections 332(c)(3)(A) and 332(c)(3)(B) of the Act. Section 332(c)(3)(A) of the Act specifically preempted state and local rate and entry regulation of CMRS.²¹ Although Section 332(c)(3)(B) permitted states to petition the Commission for authority to continue existing regulation, it was only rate regulation that states were permitted to seek authorization to continue to regulate -- not entry regulation.²² In point of fact, Congress specifically preempted state and local CMRS entry regulation and Congress provided no mechanism whatsoever for states to continue to regulate CMRS market entry. Accordingly, the attempt by the PUCO in its Statement to retain authority to impose entry regulation on CMRS at some point in the future must be firmly rejected by the Commission.

**IV. The PUCO's Statement Does Not Meet
The PUCO's Burden Of Proof To Justify Future
Rate Regulation Of CMRS And Such Rate Regulation
Is Unnecessary And Counterproductive**

6. In its Second R&O, the Commission made clear that states seeking to continue their rate regulation of CMRS, "have the burden

²⁰Id.

²¹47 U.S.C. §332(c)(2)(A); Second R&O at ¶250.

²²47 U.S.C. §332(c)(3)(B); Second R&O at ¶¶250-251.

of proof that the state has met the statutory basis for the establishment or continuation of state regulation of rates."²³ The Commission required that states support such requests with empirical evidence pertinent to the Commission's examination of market conditions and consumer protection.²⁴ The Commission even enumerated eight (8) categories of empirical evidence that states could submit to support their petitions.²⁵ The Commission specifically held that, "[i]f we determine that the state has failed to meet this burden of proof, then we will deny the petition."²⁶

7. In its Statement, the PUCO failed completely to provide any empirical evidence to support its request to retain authority to implement rate regulation of CMRS at some point in the future. Although the PUCO reiterated the eight (8) categories of evidence specified by the Commission in the Second R&O, the PUCO did not include any objective, verifiable evidence to support its request to retain authority to regulate CMRS rates. With respect to the first statutory test for continued state CMRS rate regulation,²⁷ the PUCO did not provide any analysis of the CMRS marketplace in

²³Second R&O at ¶251.

²⁴Id. at ¶252.

²⁵Id.

²⁶Id. at ¶251.

²⁷As set forth above, the first prong of the statutory test is, "market conditions with respect to [CMRS] services fail to protect subscribers adequately from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory." 47 U.S.C. §332(c)(3)(B).

the State of Ohio. In point of fact, the PUCO did not even specify the number of CMRS carriers (either cellular, paging or any other subcategory of CMRS carrier) that the PUCO believes are currently operating in Ohio. No information was provided regarding rates for CMRS service in Ohio and whether those rates: (1) have been increasing, decreasing or remaining constant in recent years; (2) are "unjust" or "unreasonable"; or (3) are "unjustly or unreasonably discriminatory."²⁸ With respect to the second prong of the statutory test,²⁹ the PUCO provided no information whatsoever with respect to whether any type of CMRS was being used in the State of Ohio as a replacement for land line telephone exchange service.

8. Based on the PUCO's failure to support its Statement with empirical evidence as required by both Congress and the Commission, the PUCO's Statement must be rejected and the PUCO's attempt to retain authority to impose rate regulation of CMRS at some point in the future must be rejected.

9. REI must also emphasize that there is no need for the PUCO to retain authority to exercise rate regulation over CMRS in the State of Ohio. It is well-established that the CMRS industry in the United States today is highly competitive. Studies have confirmed that the combination of high capacity, large numbers of

²⁸47 U.S.C. §332(c)(3)(B).

²⁹This second prong is that the market conditions specified in the first prong of the test exist and that, "such service is a replacement for land line telephone exchange service for a substantial portion of the telephone land line exchange service within such State." 47 U.S.C. §332(c)(3)(B).

service providers, ease of market entry and consumer ability to change service providers all result in an extremely competitive mobile communications industry.³⁰ The State of Ohio represents a microcosm of the national CMRS industry, with numerous CMRS carriers operating in the state, including various types of one-way paging operators, cellular carriers, traditional two-way mobile carriers, SMR operators and others. Moreover, new types of service, including 220-222 MHz two-way service and Personal Communications Service ("PCS"), are either being offered now or will be offered in the future. There is a wide-range of CMRS carriers in Ohio, including huge national carriers engaged in extremely aggressive competition and extensive price cutting and smaller local carriers. REI respectfully submits that allowing the PUCO to retain the right to impose rate regulation on CMRS at some point in the future is not necessary to ensure that the public in Ohio will enjoy the benefits of the highly-competitive CMRS marketplace that Congress anticipated when it amended Section 332 of the Act. In point of fact, if the Commission denies the PUCO's request to retain rate regulation authority, REI and other CMRS carriers will be able to more effectively compete with one another

³⁰This competitiveness is particularly evident in the one-way paging segment of the CMRS industry. See EMCI -- The State of the U.S. Paging Industry -- Subscriber Growth, End-User and Carrier Trends: 1990; EMCI, The State of the U.S. Paging Industry -- Subscriber Growth, End-User and Carrier Trends: 1993. In point of fact, in R. Ridley, 1993 Survey of Mobile Radio Paging Operators, Communications, Sept. 1993, p.20, it was noted that on average, a paging carrier faces five other paging carriers competing with it in a given market, while some paging carriers face as many as nineteen competitors.

on the level playing field that Congress has now mandated between radio common carriers ("RCC's"), Private Carrier Paging ("PCP") operators and other types of CMRS service providers. PUCO rate regulation, if imposed, can only serve to: (1) take away carriers' ability to make rapid, efficient responses to changes in demand and cost, and remove incentives for carriers to introduce new offerings; (2) impede and remove incentives for competitive price discounting, since all price changes are public, which can therefore be quickly matched by competitors; and (3) impose costs on carriers that attempt to make new offerings. Moreover, rate regulation, with its attendant filing and reporting obligations, imposes administrative costs and burdens on carriers. Based on these facts, REI respectfully submits that denial of the PUCO's Statement will eliminate these and other impediments to competition and enable CMRS carriers to provide to the public the benefits of a competitive marketplace by offering the best, most economic service packages. This competition will directly result in lower prices for service and equipment, expanding coverage areas and service options, substantial technological innovation and improvement in the construction and operation of CMRS systems and an ever-higher dedication by REI and other CMRS companies to provide the public in Ohio the best and most economical CMRS service possible.

**V. Existing PUCO Regulation Of Other Terms And
Conditions Of CMRS Must Also Be Preempted**

10. Finally, REI respectfully submits that the two (2) forms of regulation that the PUCO currently imposes on CMRS must also be

preempted pursuant to the Act, as amended by the Budget Act, and the Supreme Court's decision in Louisiana PSC. As set forth above, in its Statement, the PUCO alleged that its current imposition of complaint and contract review procedures on CMRS carriers constitute "other terms and conditions" which were not preempted by Congress.³¹ Although Congress did not "prohibit a State from regulating the other terms and conditions of [CMRS],"³² REI believes that the complaint and contract review procedures now imposed by the PUCO thwart and impede the federal policy of creating regulatory symmetry clearly enunciated by Congress and the Commission. Because it is impossible to separate the intrastate and interstate portions of the CMRS service that the PUCO currently regulates with its complaint and contract review procedures, REI respectfully submits that the existing PUCO regulation of a jurisdictionally-mixed service that impedes the valid federal policy of regulatory symmetry must be preempted pursuant to the Supreme Court's decision in Louisiana PSC.³³

11. REI must also point out that the PUCO's existing regulation of "other terms and conditions" of CMRS is not necessary given the extremely competitive state of the CMRS industry in the State of Ohio. In this regard, REI must emphasize that consumers in Ohio will continue to have recourse against CMRS carriers pursuant to those provisions of Title II of the Act that the

³¹Statement at 3-4.

³²Second R&O at ¶257; 47 U.S.C. §332(c)(3)(A).

³³See footnote 13, supra.

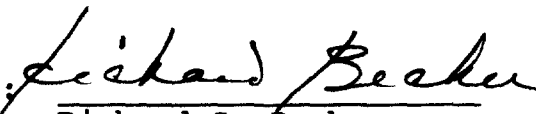
Commission declined to forebear from enforcing against CMRS carriers.³⁴ These provisions include: (1) Section 201 of the Act, including the requirement that "[a]ll charges, practices, classifications, and regulations ... shall be just and reasonable;" (2) the Section 202(a) prohibition against "unjust and unreasonable discrimination in charges, practices, classifications, regulations, facilities or services;" (3) access to the complaint procedures of Section 208 of the Act, including Sections 206, 207 and 209, which provide for collection of damages by successful complainants; and (4) the specific consumer protection provisions of Sections 223, 225, 226, 227 and 228 of the Act, covering such areas as prohibition against obscene and harassing calls and requirement to assist individuals with hearing and speech disabilities.

³⁴Second R&O at ¶¶124-213; 47 C.F.R. §20.17(a).

WHEREFORE, for all of the foregoing reasons, REI respectfully opposes the PUCO's Statement and requests that the Commission: (1) reject the Statement; (2) deny the PUCO's request for authority to continue to regulate "other terms and conditions" of CMRS; and (3) deny the PUCO's request to retain authority to impose both market entry and rate regulation on CMRS at some point in the future.

Respectfully submitted,

RAY'S ELECTRONICS, INC.

By: 
Richard S. Becker
James S. Finerfrock

Its Attorneys

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1915 Eye Street, Northwest
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Date: September 19, 1994

CERTIFICATE OF SERVICE

I, Vicky Chandor, a secretary in the law firm of Becker & Madison, Chartered, hereby certify that I have on this 19th day of September, 1994, sent by First Class United States mail, postage prepaid, copies of the foregoing "Comments" to the following:

Lee Fisher, Attorney General
James B. Gainer, Section Chief
Steven T. Nourse, Assistant
Attorney General
Public Utilities Section
180 East Broad Street
Columbus, OH 43215-3793


Vicky Chandor

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Docket # 94-109

PR File No. 94-SP7